

COMPLIANCE BOARD OPINION NO. 02-15

December 18, 2002

Angela Price, Editor
BAY TIMES

The Open Meetings Compliance Board has considered your complaint alleging that the County Commissioners of Queen Anne's County and the Queen Anne's County Board of Education violated the Open Meetings Act in connection with a closed session held at the County Commissioners' office on August 20, 2002. For the reasons explained below, we conclude that the County Commissioners had a sufficient legal basis for holding the closed session and provided legally sufficient notice of the session, but did commit certain procedural violations in connection with the meeting. The Board of Education violated the Act by failing to conduct a vote prior to meeting in closed session and failing to report the closed session in the minutes of its next open meeting. We are unable to render an opinion about other allegations raised in your complaint.

I

Complaint and Responses

The complaint concerned a joint meeting between the Queen Anne's County Board of County Commissioners and Board of Education in the Commissioners' office in Centreville on August 20, 2002. As we understand the facts, an open meeting between the two bodies was held as scheduled to address the school system's proposed capital construction projects. At some point, however, the two bodies decided to adjourn to a closed session, in reliance on §10-508(a)(9) of the State Government Article¹ in order to discuss matters involving the collective bargaining process between the Board of Education and the teachers' union.

The complaint alleged several violations in connection with the closed session, together with a more general allegation about the practices of the County Commissioners. These may be summarized as follows: *Notice*. Neither the County Commissioners nor the Board of Education provided notice of the closed session. *Basis for closing*. Because the County Commissioners are not directly involved in

¹ Unless otherwise noted, all statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of State Government Article, Annotated Code of Maryland.

the collective bargaining process, the Commissioners were not justified in holding a closed session in reliance on §10-508(a)(9). *Minutes*. The County Commissioners' minutes of the August 20 meeting fail to properly identify each participant at the closed session;² furthermore, no minutes were kept of the closed session. *Procedures*. The Board of Education never voted to meet in closed session, nor did it report the closed session in the minutes of the Board's next public session. *General practice of noncompliance*. The County Commissioners have "forbidden any record ... to be kept of what is discussed in executive session" throughout the current term and have provided information of closed meetings using solely "'evasive boilerplate,' merely listing the pertinent statutory text without any description of the topic(s) discussed."

The County Commissioners and Board of Education both submitted timely responses though their respective legal counsel.³ With respect to notice, the County Commissioners explained that neither the County Commissioners nor the Board of Education had planned on meeting in a closed session. Although the responses did not indicate precisely how the desire for the closed session materialized, evidently it arose during the course of the public session on school construction issues. Given the impromptu decision, the Commissioners contended, the manner in which notice was provided – that is, by means of their actions during the public session – satisfied the notice requirement of the Act.

In terms of justification for the closed session, the Commissioners cited §10-508(a)(9), authorizing a public body to meet in closed session to "conduct collective bargaining negotiations or *consider matters that relate to the negotiations*." The Commissioners, relying on the italicized portion of the exception, pointed out that "the [Board of Education's] ability to conduct ... negotiations requires knowledge and understanding of the issues and the monetary constraints imposed by the County budget ... [a matter] within the Commissioners' realm." Because such discussions involved "matters that relate to [collective bargaining] negotiations," the Commissioners reasoned, they were justified in closing the session.

² The Open Meetings Act requires that the minutes of the next open meeting following a closed meeting include certain information regarding the closed meeting, including a "list of persons present." §10-509(c)(2)(iv). However, the County Commissioners apparently address this requirement in minutes of its meeting that date which are made available to the public. See Part III.B.3 of this opinion.

³ Patrick E. Thompson, Esquire, responded on behalf of the County Commissioners. Thomas G. Ross, Esquire, responded on behalf of the Board of Education. Prior to our consideration of the complaint, we requested that the Board of Education supplement its response, addressing two issues raised in the complaint pertaining specifically to the Board of Education. This request resulted in the delay beyond the normal period in which we regularly issue an opinion.

In the alternative, the Commissioners suggested that the session concerning the collective bargaining process related to future budgetary requirements. In the Commissioners' view, this connection should be deemed an aspect of budget preparation, rather than the approval, disapproval, or amendment of a budget, and thus constituted an executive function excluded from the Act's requirements.

In response to the allegation that the minutes of a public meeting conducted after the August 20 session failed to accurately disclose those present during the closed session, the Commissioners stated that: "It is clear from [the] facts that the Commissioners intended to notify the public that a closed session was attended by the Board, and by those County officials responsible for collective bargaining Any omission of a specific name was clearly a minor oversight that could, and would, have been corrected...." The County Commissioners also denied that the Act's requirements about the keeping of minutes or the disclosure of a summary of closed meetings were not followed.⁴ The Commissioners indicated that the level of detail contained in their minutes is consistent with the views of the Attorney General as expressed in the *Open Meetings Act Manual* as well as in our prior opinions.

The Board of Education responded to the complaint's allegations that the Board had failed to provide notice of the August 20 closed session, did not vote to close the session, and failed to report the closed session in the minutes of its next open meeting. The Board of Education noted that the August 20th meeting was "a regularly scheduled open meeting of the Commissioners," implying that notice was given by the Commissioners in accordance with the Act. The Board also contended that notice of the closed session, "albeit short notice," was orally announced following the open session, in the presence of media representatives – an approach that "was reasonable under the circumstances." The Board's response indicated that the Board's failure to vote to go into closed session was merely "a highly technical [violation], as [the session] was closed by the Commissioners, apparently on their motion." Finally, the Board of Education acknowledged that the minutes of its next open meeting did not contain a report about the August 20 closed session.

II

Applicability of the Act to Both Public Bodies

The August 20 meeting was not a situation in which the members of one public body attend the meeting of another public body as mere invitees. Members of a public body may attend a meeting sponsored by someone else without triggering application of the Open Meetings Act, provided that they refrain from convening to

⁴ The County Commissioners provided us with a copy of the minutes from their August 20 meeting.

consider or transact public business themselves. §10-502(g); Compliance Board Opinion 98-8 (December 14, 1998), *reprinted in 2 Official Opinions of the Maryland Open Meetings Compliance Board* 27, 28. In this case, however, it is obvious that the August 20 meeting offered the members of each public body an opportunity to deliberate on a matters of public business with their colleagues as well as members of the other body. Both the County Commissioners and the Board of Education held a meeting.

When addressing a complaint involving a joint meeting of two public bodies, we analyze separately the application of the Open Meetings Act to each body. Separate analysis is required because, depending on the particular function in which each body is engaged during the course of the meeting, the result may differ. *See, e.g.,* Compliance Board Opinion 97-2 (March 3, 1997), *reprinted in 1 Official Opinions of the Maryland Open Meetings Compliance Board* 206.

III

County Commissioners

A. *Justification for Closed Session*

We must first address the County Commissioners' argument that the Open Meetings Act did not apply to the August 20 closed session. If the Commissioners were correct, we would be foreclosed from considering other issues under the Act. The gist of the argument is that the discussion with the Board of Education involved the potential impact of any negotiated contract on future County budgets. This endeavor, it is said, would involve "budget preparation" rather than the "approval, disapproval, or amendment of the budget" and so should be deemed an executive function excluded from the Open Meetings Act. *See* §10-503(a)(1)(i).⁵

This argument, however, is inconsistent with the Commissioners' role in connection with the Board of Education's budget. Unlike funding for County agencies or direct liabilities of the County government, the Commissioners have no

⁵ The Board of Education quite properly does not suggest that it was engaged in an executive function under the Open Meetings Act. The Board of Education's role in collective bargaining negotiations clearly is a quasi-legislative function under the Open Meetings Act. §10-502(j)(3); *Carroll County Education Association, Inc. v. Board of Education of Carroll County*, 294 Md. 144, 448 A. 2d 345 (1982). Although the State law authorizes a board of education to "meet and deliberate in executive session if the matter under consideration is ... labor relations," Education Article, §4-107(d)(2), a board of education that desires to meet in closed session must close the meeting under §10-508(a)(9) in accordance the procedural requirements of the Act. 294 Md. at 152 (statutes must be harmonized to extent possible).

role in the *preparation* of the budget of the Board of Education. The Board of Education is charged with preparing the school system's budget. Education Article, §5-101. The Commissioners' role in connection with the school system budget is strictly a quasi-legislative function, §10-501(j)(2), which by definition cannot be an executive function. §10-501(d)(2)(v). Thus, we reject the argument that the Act did not apply at all and turn instead to the question whether the "collective bargaining" exception in the Act, §10-508(a)(9), justified the closed session.

The Commissioners stated that the purpose of the closed session was to consider matters related to collective bargaining negotiations between the Board of Education and the local teachers union. The Commissioners acknowledged that they play no direct role in collective bargaining negotiations. "However," the Commissioners observed in their response, "the ability to conduct such negotiations requires knowledge and understanding of the issues and the monetary constraints imposed by the County budget. The County budget, and the ability to increase or decrease appropriations necessary to successful bargaining *is* within the Commissioners' realm." Indeed, State law governing collective bargaining between local boards of education and professional employees acknowledges the role of the county governing body in connection with funding. *See* §6-408(d)(7) of Education Article, Annotated Code of Maryland.⁶

If the pertinent exception, §10-508(a)(9), were limited to the "conduct [of] collective bargaining negotiations," we would find a violation, for the County Commissioners do not perform that role. The exception, however, applies not only to the conduct of negotiations but also to "matters that relate to the negotiations." Giving due regard to the principle of construction that this and the other exceptions "shall be construed in favor of open meetings ...," §10-508(c), we consider that a matter "relates to the negotiations" only if it has a direct and material bearing on the conduct of negotiations.

This test is met when the topic of discussion is the availability of County funds to pay for salary and other benefits under a potential collective bargaining agreement. Surely the Board of Education's bargaining strategy would be directly and materially affected by the amount of appropriations that would be available for this purpose. Consequently, the County Commissioners' reliance on §10-509(a)(9) to close the August 20 session did not violate the Act.

⁶ The statute reads in part:

Notwithstanding any other provision of [Title 6, Subtitle 5 of the Education Article,] the public school employer shall make the final determination as to matters that have been the subject of negotiation, but this final determination is subject to the other provisions of [the Education Article] concerning the fiscal relationship between the public school employer and the county commissioners ..."

B. Procedural Allegations**1. Notice**

The complaint alleged that the County Commissioners failed to give notice of the closed session as required by the Open Meetings Act. As we understand the situation, there is no suggestion of any problem with the notice of the open meeting that had been planned to discuss school construction projects.

The Open Meetings Act requires that a public body give “reasonable advance notice” of an open or closed meeting. §10-506(a). “Whenever reasonable,” meeting notices are to be in writing; include the date, time, and location of the meeting; and, “if appropriate, include a statement that a part or all of the meeting may be conducted in closed session.” §10-506(b). The Act also grants public bodies considerable flexibility in the means of notice, allowing “any ... reasonable method.” §10-506(c).

This overall “reasonableness” standard about notice apparently reflects the Legislature’s recognition that, occasionally, public bodies must meet without much advance preparation. In such situations, the public body is to provide “the best public notice feasible under the circumstances.” Compliance Board Opinion 94-1 (March 22, 1994), *reprinted in 1 Official Opinions of the Maryland Open Meetings Compliance Board* 56, 57. The same approach applies when a public body decides unexpectedly to close a meeting. *Id.*

In this case, it appears that members of the press were made aware of the decision to conduct the closed session at the very time the decision was made. Therefore, whether the closed session is viewed as a separate meeting announced during the immediately preceding open session, or as a closed portion of the planned meeting for which notice had been given (albeit without mention of the unforeseen closed session), no violation occurred. The closed session was not anticipated and reasonable notice was, under the circumstances, provided as part of the public session.

2. Identification of Attendees

The complaint alleged that the County Commissioners failed to properly document those attending the August 20 closed session, as required by the Act. When a public body meets in closed session pursuant to any of the exceptions in §10-508(a), the minutes of the next open meeting are to include, among other information, a list of persons present during the closed session. §10-509(c)(2)(iv). Someone reviewing the minutes should be able to determine the information required under the Act, including who attended. Compliance Board Opinion 02-7 (June 18, 2002), slip op. at 6.

The Commissioners refer us to a prior opinion in which we stated that the requirement for the listing of the persons present “is open to the interpretation that, under limited circumstances, the ‘persons present’ may be ‘listed’ by more general descriptions, if direct identification would be inconsistent [with] other provisions of the Act or would frustrate any of its underlying objectives.” Compliance Board Opinion 99-9 (July 14, 1999), *reprinted in 2 Official Opinions of the Maryland Open Meetings Compliance Board* 60, 62. The cited opinion dealt with limited situations in which disclosure of an actual name would compromise the very purpose of the applicable exception. For example, the Act does not require identification of an employee appearing in a closed disciplinary hearing before a public body. However, none of the concerns addressed in that opinion is at issue here. In our view, Compliance Board Opinion 99-9 is inapposite to the situation before us.

While we accept the Commissioners’ assertion that there was no attempt to hide from the public those who attended the closed session, the failure to accurately and timely disclose the identity of each individual in attendance during the closed session is a violation of the Act.

3. Preparation of Minutes

The final allegations raised against the County Commissioners involve the failure to keep minutes of any of their closed sessions, including the one on August 20. The complaint also alleged that the Commissioners routinely fail to provide the public with the level of information regarding closed sessions required by the Act.

The Open Meetings Act requires that a public body have written minutes of meetings that are subject to the Act prepared “as soon as practicable” after the meeting and sets forth minimal information that the minutes must contain: each item considered, the action taken on each item, and each recorded vote.⁷ §10-509(b) and (c)(1). Minutes are required whether the meeting is open or closed. Furthermore, following a closed meeting, the Act requires that the minutes of the next open session include certain information pertaining to the prior closed session. §10-509(c)(2). The information required includes a statement of the time, place, and purpose of the closed session; a record of the vote of each member as to closing the session; a citation of the authority under the Act for closing the session; and a listing of the topics of discussion, persons present, and each action taken.

Instead of keeping a separate set of minutes for a closed session, the practice of the County Commissioners is to include a description of the closed session in minutes of its public sessions of the same date. In our view, this practice satisfies the Act, because it makes information available to the public more quickly than the Act

⁷ Of course, a public body is free to provide more detailed information in its minutes as long as the information required by the Act is provided.

requires. *See* Compliance Board Opinion 02-2 (February 25, 2002), slip op. at 6-7. Our conclusion assumes that the public is aware of the practice and that the minutes include the minimum information specified in the Act.

In the case of the August 20 closed session, the minutes state:

State Government Article Section 10-508,(9) [*sic*] conduct collective bargaining negotiations that relate to the negotiations; “The County Commissioners held an Executive Session on motion of Commissioner Davis, seconded by Commissioner McQueeney and made unanimous by Commissioner O’Donnell, at 9:45 a.m. in the office of the County Commissioners, the Liberty Building, 107 N. Liberty Street, Centreville, Maryland”. Mr. Mark Belton, County Administrator, Dr. Bernard Sadusky, Superintendent, and Board members of the Queen Anne’s County Board of Education met with the Board[.] No decisions were made in Executive Session. The Board adjourned in Executive Session at 10:10 a.m.

The description appears to satisfy the requirements for the contents of minutes. *See* §10-509(c)(1). However, the minutes apparently were intended as well to satisfy the reporting of a closed meeting under §10-509(c)(2), and for this purpose the description clearly falls short. We discussed the description of “persons present” above. In terms of providing “a listing of the topics of discussion,” the minutes go no further than to repeat the applicable statutory provision. Thus, assuming that minutes provided were intended by the Commissioners as satisfying §10-509(c)(2), the description violates the Act. *See, e.g.,* Compliance Board Opinion 98-5 (June 18, 1998), *reprinted in 2 Official Opinions of the Maryland Open Meetings Compliance Board* 18, 19-20.

Based on the record before us, we are unable to address your more general allegation concerning the level of information routinely provided by the County Commissioners in connection with meetings closed pursuant to provisions of the Act. We have no basis on which to say whether the deficiencies in the minutes related to the August 20 closed session reflect a general practice or an isolated problem.

IV

Board of Education

A. Notice

In terms of notice, the Board of Education simply pointed out that the meeting was a regularly scheduled meeting of the County Commissioners. We interpret its response as acknowledging that separate notice was not provided by the Board of Education.

Although the Open Meetings Act does not require a public body to provide an advance agenda, we note that the County Commissioners, like many public bodies, make an agenda available to the public prior to its meetings.⁸ And, as we noted above, the closed session on August 20 may be viewed as part of the meeting for which notice was apparently given. However, the responses did not include a copy of the Commissioners' notice. Therefore, our conclusion is a contingent one: If the Commissioners' notice informed the public that they would be meeting with the Board of Education, substantial compliance with the notice requirements of the Act was achieved on behalf of both public bodies. *See Compliance Board Opinion 98-8 (December 14, 1998), reprinted at 2 Official Opinions of the Maryland Open Meetings Compliance Board 27, 29-30.* If, however, the Commissioners' notice failed to inform the public of the meeting with the Board of Education, a violation occurred.

B. Required Vote; Subsequent Reporting

In light of the Board of Education's acknowledgment that they neither voted prior to meeting in closed session with the County Commissioners nor recorded the closed session in its subsequent minutes, extensive discussion is not warranted. These lapses violated the Act.

In defending its actions with respect to the vote, the Board of Education stated that, if there was a violation, "it is a highly technical one." We decline to draw distinctions of this kind among violations. The joint closed session could not have occurred without the Board of Education's agreement. To suggest that it was the Commissioners' decision to close the session ignores the purpose for the Act's required vote: to hold the members of the Board of Education, like the County Commissioners, accountable to the public for the decision to meet behind closed doors. *Compliance Board Opinion 02-6 (June 18, 2002), slip op. at 5.*

⁸ The County Commissioners post their agenda on the County's website, <http://www.qac.org/depts/cmnrs/cmnrs.htm>.

V

Conclusion

The County Commissioners were justified in conducting a closed session, pursuant to §10-508(a)(9), in connection with budgetary matters that directly related to collective bargaining negotiations between the Board of Education and the union. Moreover, they did not violate the notice requirements of the Act. In our view, the County Commissioners' practice of keeping minutes of closed meetings in connection with public sessions occurring the same date is acceptable, provided that the public is aware of the practice and the minutes accurately account for the information that the Act requires. However, assuming the Commissioners intended the minutes submitted with its response as fulfilling their obligations under §10-509(c)(2), the level of information was inadequate.

The Board of Education violated the Act by failing to vote prior to meeting in closed session August 20 and by failing to report the closed session in the minutes of its subsequent public session. Although they apparently failed to provide notice to the public of the August 20 meeting, had the Commissioners' notice indicated they would meet with the Board of Education, substantial compliance was achieved.

OPEN MEETINGS COMPLIANCE BOARD*

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*Chairman Walter Sondheim, Jr. did not participate in the preparation or approval of this opinion.